

### REMARKS

Claims 1, 4, 6-11, 22-32, 37-41, 44 and 48 have been rejected under 35 U.S.C. 102(e) as being anticipated by Melican. This rejection will be discussed as it pertains to each of Applicants' independent claims.

#### Claims 1 and 37

Claims 1 and 37 feature a device and method, respectively, for tissue repair and replacement. As amended, these claims require that Applicants' claimed device, when initially implanted, does not have sufficient porosity to support tissue ingrowth. Thus, the porosity required to support tissue ingrowth only develops after the first component begins to degrade *in vivo*. In contrast, Melican describes an implant that includes a polymeric foam component having pores with an open cell pore structure. Melican expressly states that, "the structure of the implant must be suitable to encourage tissue ingrowth." (Col. 3, lines 1-22.) It is clear from the context of the reference that Melican is referring to the structure of the implant prior to implantation. For example, in Example 1 Melican describes the manufacture of an implant, and states at the end of the example that "the pores in this foam [shown in FIG. 7] have been optimized for cell ingrowth." Thus, Melican teaches away from devices which, when initially implanted, do not have sufficient porosity to support tissue ingrowth.

#### Claim 22

Not one of the features recited in claim 22 is taught or remotely suggested by Melican. The device described by Melican is not substantially non-porous prior to implantation in a patient; instead, as discussed above, the surface of Melican's device is porous due to the use of an open cell foam. Moreover, Melican does not teach or suggest a porous ceramic structure, and thus, not surprisingly, does not teach or suggest a polymer disposed in pores of the ceramic structure. If the Examiner chooses to maintain the rejection of claim 22, Applicants respectfully request that the Examiner point out where in Melican the Examiner believes that these features are found.

**Claim 39**

Claim 39, as amended, requires that the scaffold be infiltrated with a sufficient amount of the second component to render the device substantially non-porous. As discussed above, the surface of Melican's implant is porous, and thus for at least this reason claim 39 is not anticipated.

**Claim 48**

While Applicants do not concede that claim 48 is anticipated, this claim has been cancelled to expedite prosecution.

**Dependent Claims**

The dependent claims are patentable for at least the same reasons as the independent claims from which they depend.

In view of the above, Applicants respectfully request that the rejection under 35 U.S.C. 102(e) be withdrawn.

Applicants note that the fact that the Applicant has stated arguments with respect to certain positions of the Examiner does not mean that the Applicant concedes any other positions of the Examiner. The fact that the Applicant has made arguments for patentability of certain claims does not mean that there are not other good arguments for patentability of those claims or other claims.

The Examiner has indicated that claim 3 has been withdrawn from consideration. Applicants respectfully submit that claim 3 reads on the elected species; Applicants erroneously omitted this claim from the list of claims that read on the elected species in Applicants' response to restriction filed September 15, 2003.

It is believed that no fees are due with this response. Please apply any charges or credits to deposit account 06-1050, referencing Attorney Docket No. 00167-482001.

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Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Celia H. Leber', written over a horizontal line.

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